MICHIGAN SUPREME COURT

PUBLIC HEARING
JUNE 27, 2002

JUSTICE CORRIGAN: Good morning and welcome to this special session of the Michigan Supreme Court. On behalf of my colleagues we're glad to see all of you this morning. Many of you have signed up to speak. I just want to review the rules of the road here and that is that you will be given 3 minutes to speak without interruption by the Court. And we ask you then without to come forward.

Item 1: File 1999-31 - Proposed Rules for the Judicial Tenure Commission

MR. FISCHER: If the Court doesn't mind, can we have Judge Murphy speak before me?

JUSTICE CORRIGAN: Certainly.

JUDGE WILLIAM MURPHY: Good morning Justices, may it please the Court. It has been a long time since I've had the opportunity to say that. My name is Bill Murphy. I'm chair of the Judicial Tenure Commission and appear here today in that capacity. We have, as you know, submitted extensive comments regarding the proposed rule changes and our Executive Director, Paul Fischer, is here today to basically address the substance of that. But I'm here to, on behalf of the Commission, thank the Supreme Court for undertaking this rather extensive review of the rules. It has been probably 30, maybe 32 years since there has been a comprehensive review of these rules and although there have been changes from time to time, I think it's helpful and healthy to have a complete review and that is what is taking place. I particularly want to compliment Justice Markman and your staff attorney, Linda Rhodus, for their efforts and openness in trying to address the rules. We have had a couple of meetings with Justice Markman and Linda Rhodus where we have had an opportunity I think to explain in some detail how we operate, how our procedures take place and I hope that has been helpful to the Court in trying to arrive at some decisions about the proposed rules. With some limited serious concerns that Paul Fischer will address and some of the housekeeping matters that are set forth in what we have submitted to the Court, the Commission is in support of the proposed rule changes. In fact, most of the proposed rule changes are consistent with our current practices. There is one section that I would like to briefly comment on and that's regarding proposed rule 9.203(A). This rule deals with our internal operating procedures and as proposed would require that our procedures be adopted and published so long as they don't conflict with existing court rules. The commission has absolutely no problem with that proposal and in fact would never plan to deal with internal operating rules that

are inconsistent with court rules. But what the proposed rule also requires is that we seek and submit for approval from the Supreme Court our internal operating procedures. I believe this is somewhat of a carryover from the existing rule which in practice really hasn't occurred much. We have internal operating procedures and practices that have gone on from time to time through either neglect or unawareness. We have not submitted those to the Supreme Court for approval and what we would suggest to the Court is that we be permitted to deal with our own internal operating procedures, that we put them together, that we publish them, that we forward them to the Supreme Court, that we function on the basis that they not be inconsistent with any court rules. This is consistent I think with how Attorney Grievance operates. Frankly the Court of Appeals that I serve on operates with internal operating procedures and we just feel that it would be less cumbersome that to have to submit every proposed change or difference to the Supreme Court for approval. I can say to the Court that in my capacity as chair what I have done is appointed a committee to review the policies and practices of the Commission that have occurred basically since 1968. We are compiling those. We hope to have our working product finished by the end of our July meeting to be submitted to the full Commission in September and then forwarded on to the Supreme Court. But what we're trying to do is codify practices and procedures that have occurred in the past so that we can put them in one form, have them published so that anyone who comes before the Commission knows what we're doing and of course submit them to the Supreme Court so that the Court will be aware of our internal operating procedures. With those limited comments I would again like to thank the Court for its effort in looking at our proposed rules. I think and I hope that the court recognizes that the Commission in view of decisions from this Court has been making every effort to try to comply with what we understand to be the Court's directive in its decision making and I think we're on the right path to continuing to function in the way that protects the public interest in our courts.

JUSTICE CORRIGAN: Do any Justices have any questions for Judge Murphy.

JUSTICE YOUNG: I have one. Judge Murphy, the District Judges Association has advocated, although these rule proposals do not incorporate, that the JTC's processes be bifurcated. I'd like to hear the best argument you've got for why that should not occur.

JUDGE MURPHY: Well, I think there are probably several points on that and maybe Paul can address them in more detail but I just want to briefly indicate to you, we functioned without a form of bifurcated system since the Commission came into existence in '68. Perhaps there's an argument that the Constitution would have some limitation on whether or not we could be bifurcated.

JUSTICE YOUNG: What would that limitation be constitutionally?

JUDGE MURPHY: Well the Constitution, and I don't have it in front of me, but talks in terms of the Commission making the recommendation to the Supreme Court and it talks about the process by which commissioners are elected to the Commission and if in fact we are bifurcated it is not really the full Commission making the recommendation to the Supreme Court.

JUSTICE YOUNG: There are lots of different ways of bifurcating and investigative from an adjudicative function.

JUDGE MURPHY: I'm not going to dispute that, Justice Young. I don't know what you might have in mind but that is one of the reservations but beyond that there are just some practical difficulties of trying to deal with a bifurcated system. We're right now somewhat taxed and you know most of us have daytime jobs and if what we have to do is deal with a bifurcated system that is more cumbersome that's going to create some practical problems. It's going to create some expense problems, I think, if we do that. And I really think that the way we function once a decision is made to proceed we are functioning as a bifurcated system because the executive director who prosecutes has no involvement with the process as far as the decision making by the Commission.

JUSTICE CORRIGAN: Can you explain one part of the rules that you're advocating because I was bothered by that. I don't understand how it works in practice. It's in line with Justice Young's question. One of the proposed rules says the executive director or any other staff person who is involved in the investigation or prosecution of a judge, and this is the amendatory language (A) shall not be present during the deliberations of the Commission or participate in any other manner in the decision to file formal charges or to recommend action by the Supreme Court with regard to that judge. Doesn't that constrain the executive director to no participation. I don't understand how the executive director will function under that proposed amendment.

JUDGE MURPHY: Well the executive director, once a decision is made by the Commission to proceed with formal charges, is removed from his involvement with the Commission as far as that case goes.

JUSTICE CORRIGAN: That's after they're filed. But this says "in any other manner in the decision to file formal charges." Doesn't that preclude him from participating in the prosecution function then?

JUSTICE YOUNG: And advising the Commission.

JUDGE MURPHY: Well he does not advise the Commission once we proceed with formal charges.

JUSTICE CORRIGAN: But the language does not say that. The language says shall not participate in any other manner in the decision to file formal charges. Is that just an oversight.

JUDGE MURPHY: I'll let Paul address that but the executive director prior to filing formal charges does participate in the process but once the decision or during the decision making process by the Commission where we take a vote on it, the executive director does not participate in that. But I'll let Paul clarify that.

JUSTICE TAYLOR: Judge Murphy, I have a question for you. How would the Commission address the problem that let us say could be occasioned where the internal operating procedures are, you know, just to make an easy hypothetical, that no left-handed member of the Commission could make a motion. And let's suppose for whatever reason the Commission approved that. What's the remedy?

JUDGE MURPHY: Do you know which of our Commissioners are left-handed? No, I would hope that there would be some sense that there's some judgment by the Commission but I think that if there is anything that we do on an internal operating procedure that's inconsistent with the court rule, any judge or attorney that is dealing with the process would be open and free to challenge that procedure and bring it to the attention of the Court and let the Court decide--

JUSTICE TAYLOR: How would that happen then? Would one of the Commissioners who is left-handed, let us say, petition the Court to throw out the IOP.

JUSTICE YOUNG: Is that a mandamus or something?

JUSTICE TAYLOR: I just don't know quite how you guys perceive that would be dealt with.

JUDGE MURPHY: I guess my visceral response would be just to challenge it in the process itself on how we're proceeding and if in fact what we have done is something that's inconsistent with the court rule, that they would have a legitimate challenge to that process.

JUSTICE TAYLOR: Well suppose it's inconsistent with something other than the court rule. Maybe state statute or the Constitution, something of that kind. How would you anticipate that a person aggrieved by that on the Commission would make

headway.

JUDGE MURPHY: I think they could challenge it to the Court in a process--

JUSTICE TAYLOR: Is there something in the rules that provides for that.

JUDGE MURPHY: In the proposed rules? I don't think it's addressed in the proposed rules.

JUSTICE TAYLOR: Would that then be something that should be added. Because it would seem that the very first thing that would happen, and let's assume how the Commission really wants this left-handed rule. Of course the left-handed fellow doesn't. The minute he asks about this the Commission says to the Court there's no standing here. It's our rule. We have control over this.

JUDGE MURPHY: I'm not sure how it's done and challenged right now with the attorney grievance or with the Court of Appeals or with attorney discipline. I'd have to research that I guess.

JUSTICE TAYLOR: Right off the bat I'd say with the Court of Appeals if they did something like that, we'd just tell them no, don't you think.

JUDGE MURPHY: I'm sure you would.

JUSTICE TAYLOR: I'm not saying it's a bad idea to have you folks make your own rules but I'm not quite sure what happens if you have somebody disadvantaged by this in a way that they feel is improper, what they do.

JUSTICE YOUNG: Isn't it true in the case of the Court of Appeals IOP's, if the IOP's are an inappropriate interpretation of the rule, those get challenged and appealed. If somebody is disadvantaged by an interpretation of the rules and the IOP's in the Court of Appeals, those become part of an appeal.

JUDGE MURPHY: But any process that we undertake that results in any formal disciplinary action is brought to this Court with our recommendation and if there's a flaw in that process it seems to me that the person who is aggrieved by that would have an opportunity to challenge it.

JUSTICE TAYLOR: How would a judge who couldn't have a motion made to dismiss the case because the left-handed person wanted to make it, how would he

even know that. Know that he's been disadvantaged so as to bring it to our attention.

JUDGE MURPHY: Well our internal operating procedures as we're proposing would be published and available.

JUSTICE TAYLOR: I'm not trying to be difficult here. We have a judge who has been disciplined who apparently you would say his remedy is he could appeal up the adjudication to the Supreme Court. But how would he know that he could have won but for this internal operating procedure. He could have won in front of you folks.

JUDGE MURPHY: I don't have an answer to that.

JUSTICE KELLY: I have a question about the jurisdiction of the Commission and go to Rule 9.201 in definitions. The proposed rule would say that a judge is a person who is serving as a judge of an appellate or trial court by virtue of election, appointment or assignment or a person who formerly held such office and is named in a request for investigation with respect to conduct that occurred during a person's tenure and is related to the office or a magistrate or referee appointed or elected under the laws of the state. Now the Tenure Commission recommends a change in that to read that a judge should be a person who formerly held such office and is named in a request for investigation that was filed during the person's tenure and is related to the office. In light of the fact that we have defined the importance of the Commission in part as being to enhance public confidence and protect the public courts and rights of judges who are governed by these rules, why would we not want the Tenure Commission to look into alleged unethical conduct of someone who was a judge whether or not that claim is made during the person's tenure or after.

JUDGE MURPHY: And they're not currently a judge?

JUSTICE KELLY: Right.

JUDGE MURPHY: I think it's just a practical problem that what can you do, what can we do. There's no discipline or sanction that's available to deal with that and it's better in that situation to let the attorney grievance deal with it.

JUSTICE YOUNG: Doesn't it affect whether you can be appointed?

JUSTICE KELLY: We have had this come up before and we found that it influenced--if the person is still practicing law the Tenure Commission might be better equipped to handle problems that go to the judge's ethical standards rather than the lawyer's ethical standards and also if that person should wish to be appointed or run again

for a judgeship, it seemed to us, at least to me at the time that it would have been better for the JTC rather than the Attorney Discipline Commission handle it.

JUDGE MURPHY: Well if they're appointed and they are serving we would have jurisdiction but if they're not serving as a judge under the Constitution and even the court rules, the Commission would take action and what sanction can we recommend to the Supreme Court and what sanction can the Supreme Court then impose. Can't suspend the judge, can't remove the judge. I suppose theoretically you could deal with public censure and if that's where the Court is inclined to go then it can be dealt with but I guess our view is that because there really are limited or almost no sanctions that can be recommended, no practical effect of what we can do, that it's better to let the attorney discipline system deal with that and let us deal with the people that are currently serving in judicial capacities.

JUSTICE KELLY: Might we not consider amending the rules to give the Tenure Commission the authority to suspend or recommend suspension or disbarment of a former judge or magistrate or to recommend suspension or disbarment as a lawyer.

JUDGE MURPHY: We as a Commission really have not addressed that. Perhaps Paul Fischer might be able to have some practical input on whether or not he thinks how workable that is.

JUSTICE KELLY: This is a person who falls between the cracks so to speak. You can understand that if we ask the Commission the question we're going to hear from them that they're not equipped to judge somebody who was functioning under the code of judicial ethics. So we need to find the best solution to this and it's not a good fit for either one of the organizations. I recognize that.

JUDGE MURPHY: I think again what has controlled our thought process in that is that there really was no practical sanction that we could recommend for the most part to the Supreme Court if in fact we found that there had been misconduct and we did not have open to us an opportunity to make some recommendation with any authority to the disciplinary process.

JUSTICE CORRIGAN: All right, anything further for Judge Murphy? Thank you Judge Murphy.

JUDGE MURPHY: I appreciate your time and your consideration and your efforts in this regard. Thank you.

JUSTICE CORRIGAN: All right, now we'll hear from Mr. Fischer.

MR. FISCHER: Good morning, may it please the Court. My name is Paul Fischer, I'm the executive director of the Tenure Commission. Rule 207(C), the one with notice to the judge, for the most part I think we can live with the rules. The ones I want to point out right now are the ones we find the most troubling. I say we, it's the Commission, speaking on their behalf. The Commission opposes the provision here for giving prompt notice. Where it says the Commission must promptly give written notice to the judge. Because it would create an extraordinary burden on the Commission to have to go and notify every judge, especially in light of the fact that 90% of the complaints that get filed with the Commission get dismissed without having to ask the judge's comments. Only 10% of the cases, because the math is simple, do we have to ask for the judge's comments. And so it would be a burden for us to have to ask those other 90%. In addition, and this is just something that I found out during the course of sending out these comments, as you know or maybe you don't know, after the Commission came up with the comments that it had for the rules that we submitted to you in April, we sent them out to the different judges' organizations so they would see where it is that the Commission is coming from. We sent it to the attorney grievance, attorney discipline, state grievance commission, everybody that we could think might be interested in it. One of the judges called me up and said don't ever send me anything again. I said why? He said because I get something from you and I have a heart attack when I see that it has your return address on it. We don't even put JTC on it, we just put our post office box on it, but everybody knows, apparently, who it is that we are.

JUSTICE CORRIGAN: It doesn't say JTC, it says 211 West Fort, doesn't it. One gets enough of those every month, we know.

JUSTICE KELLY: But it always says confidential, if I recall.

MR. FISCHER: Just as an example that judge said, please, you know, just gave him a heart attack. And I found it interesting to note too that the Michigan Judges Association felt the same way. That it's impractical and they want to dispense with that notice requirement, and the District Judges didn't make any comment about that. So I would say that it looks to me that it seems that the judges don't really want to be told right away that something is going on. The Commission does notify the 10% of judges where it is important to get the judge's comments, and most of those cases the judge's comments end up clearing up the matter and nothing results from that. And the Michigan Judges Association recommended revised version, combining 1 and 2 requiring notice only where the action would be other than a straight dismissal. The Commission hasn't decided that but I can say that the Commission would have no problem with that. That's basically what the Commission's practice is right now. We only will do a dismissal with a caution or explanation or admonishment with the judge's comments having been obtained first.

(C)(3) is allowing a hearing if the judge requests one in response to one of these other than straight dismissals. And again this is an extreme overburden on the Commission. The Court should remember that the nine commissioners are all doing something else. They don't get paid for this. They show up once a month to do a meeting and a hearing would be an extreme burden on them considering that I forgot the number but I think it came out that there would be two or more a month approximately. And what kind of hearing would it be, evidentiary or not. I think what the Court wants to do is to have some kind of due process to know that the judge has had an opportunity to say something to the Commission before the Commission does something to the judge, so to speak, and the trial courts and Court of Appeals can dispense with oral arguments. You can submit something in writing and that's not seen as any kind of intrusion on due process. And I would submit that doing the same thing here, allowing the respondent judge to submit his or her comments by writing is sufficient to allow the, to satisfy the due process comment that the judge under investigation would have been able to submit whatever would be needed in those 10% of those cases where it was needed. I had other things to say if you want to hear them.

JUSTICE CORRIGAN: If you have other things to say you can submit them in writing.

MR. FISCHER: Okay, I did. Any other questions?

JUSTICE CORRIGAN: Any questions for Mr. Fischer? Go ahead, Justice Markman.

JUSTICE MARKMAN: Well Mr. Fischer, I guess I'd like to afford you the opportunity to respond to Justice Young's earlier question concerning the merits of bifurcation as well as to summarize your understanding of what the various judges' associations have said about that issue.

MR. FISCHER: It is my understanding that only the district judges were in favor of it. Michigan judges were not. The probate judges adopted the recommendations that the Tenure Commission submitted and the Judicial Conference couldn't come to any kind of an organization. As I understand the way the Judicial Conference works, it sounds like the old articles of confederation. Everyone has to agree or else nothing ever happens. But in answer to your question it would be a constitutional problem. I also don't have a copy of the Constitution in front of me but I remember that it does say a Judicial Tenure Commission shall be established, but it says "a" the indefinite article. And I would think that by bifurcating you are now creating two which is not "a".

JUSTICE YOUNG: Well let's talk in terms of segregating the investigative

from the adjudicative so that we're not talking about dividing a commission into multiple units but separating its investigatory--as I understand the Constitution, the Commission's job is to make a recommendation to us.

MR. FISCHER: So instead of having two separate organizations the way the attorney system is, it's going to be one organization with two functioning parts. There are eight states that have a two-tier system and Kansas is one of the ones that has a system like what you just described. They have a greater number of commissioners, I think they have 14, and they're divided into two panels of 7 each. I think with the 9 commissioners that we have right now it would be again impractical to have some of them working on part of it and others working on the other. You would always have to have two separate bodies. The Kansas one works that Panel A is the investigative panel this month and Panel B is the adjudicative panel the next month. In terms of the number of cases we have, I think 68 is the number of formal complaints that have been issued since the Commission was established in '68. So that's 34 years so only approximately two a year so it doesn't become a major issue except in those two cases a year. In fact in the year 2001 we didn't have any formal complaints so the other body would have been sitting doing nothing. And they would also need some sort of funding, I think I've pointed out--

JUSTICE YOUNG: Are you suggesting that there is no way to increase the distance between the investigative and adjudicative function other than by dividing the Commission itself.

MR. FISCHER: Some commissions have what they call a commission council and a disciplinary council. That takes place in California, for example. But what's interesting about that is that California, which is the first state that had a judicial discipline organization--in fact Michigan's is based on it. I think it was 1960 they started theirs. It's like ours is right now. Nine, five judges, two lawyers, two non-lawyers. And they were established by constitutional provision. By constitutional provision they changed over the course of years. It wasn't something that was done by court rule. So it was something that in theory the people of California came up with. I suppose then if the people of Michigan wanted to come up with something like that, that's something that we would live with. I just submit that it's not within the Court's realm now to change the way the system was set up. It was based on the California mode and it's been like that ever since. If the Court wants to change a few things about the constitutional makeup of the Commission--

JUSTICE YOUNG: No, I'm just suggesting administratively that there be a greater distance between the adjudicators and recommenders and the investigators.

MR. FISCHER: Again, I think it comes to the point of why do that.

JUSTICE YOUNG: You're not a member of a commission so if we choose to make an investigation council that doesn't seem to impinge on the constitutional values that you're talking about.

MR. FISCHER: Speaking on behalf of the Commission, the Commission feels otherwise. The Commission feels that that would be an intrusion on their authority and that it would be an unconstitutional matter. And again I'm just an employee there, I just do what it is they tell me. But that is specifically what they decided in their meeting when they considered the proposed changes. I point out too for the Court--

JUSTICE CORRIGAN: When you respond in that fashion, is that to say the specific suggestion regarding division of commission council from the let's call it the prosecutorial arm, that it's the Commission's view that that particular division of responsibilities administratively is unconstitutional. Is that what you're relating to us.

MR. FISCHER: I don't want to say that because that discussion took place awhile ago and it's not that fresh in my mind. I don't want to say that.

JUSTICE CORRIGAN: I understand that they're saying you can't divide the Commission into two arms, but the question of whether there could be a prosecutor and a council to the Commission post-filing is a separate issue.

MR. FISCHER: And I don't want to say that for them. But I know that the issue comes up because people wonder if the due process--

JUSTICE YOUNG: There is no due process. The Supreme Court says a unified system is not an offense against due process. So this goes to prudential considerations.

MR. FISCHER: But now I'll pose something to you. You, right now, not now but you're considering this, you'll make some rules. And then at some point you're going to adjudicate those rules so the rules were fair. Now you do this all the time. Sometimes things get reversed. You make evidentiary rulings, you make MRE and now you can go and say no, we're going to change that again. So in essence you conduct a legislative function by passing a rule, and then you act as the judges again. You don't have any problems doing that. The system doesn't have any problem with you doing that, and I don't think that anybody should really have a problem with the Commission doing what it does which is in essence a combined function. It's an executive function and a judicial function. Except that the judicial function of the Commission is reviewable by the court, whereas yours isn't really reviewable by anybody except for the people in

Washington and only under very limited circumstances. So it's a little bit different. There are combined executive and judicial with the Commission, just as there are combined legislative and judicial with you and everybody is comfortable with it. The Commission, remember, is made up of 5 judges and 2 lawyers plus the two non. So it's a sophisticated group that is able to divorce itself from what it heard at the one time to what it hears the second time.

JUSTICE MARKMAN: Mr. Fischer, isn't it fair to say that there are in fact a number of provisions in the rule that was circulated that do attempt to increase the distance between the investigative and the adjudicative functions. Was there an effort made to consult with the Commission to see what the informal practices were of the Commission and to try to put those in black and white in the rules to ensure that there was some distance and some separation between those functions.

MR. FISCHER: Absolutely.

JUSTICE MARKMAN: Could you share with the Court what some of those might be.

MR. FISCHER: Are you talking about the different meetings that have taken place coming up to now. I'm not sure. I don't understand the question, I guess, 100%.

JUSTICE YOUNG: I have a technical question. I notice in 9.202 there is a change to accommodate vacancies, the succession. And that one of them seems to contemplate, or two of them, D and C, seem to contemplate the possibility that a judge could be appointed by the bar to fill one of its vacancies. Is that consistent with the constitutional scheme where there are certain numbers of lawyers and judges and lay people apparently allocated to the Commission. In other words, can the number of judges be increased by an appointment made by the Bar.

MR. FISCHER: I don't see that in the rule. No, the State Bar can't increase the number of judges. The proposal I thought you were talking about was the 202(C)(1)(b) vacancy where the judge who is the member of the Commission which right now is Judge Harwood, if she should run for the Court of Appeals and get elected, according to the way the rule is now, she no longer holds the office she held when she was elected to the Commission. She has to get off. And I don't think that really should be the issue because the State Bar elected a judge to be there. They elected Pamela Harwood to be the representative there. I don't think it mattered to the membership there that she was a district judge, a circuit judge or a Court of Appeals judge.

JUSTICE YOUNG: I guess I'm asking the question, does the Constitution seem to contemplate that the Bar is electing judges or lawyers.

MR. FISCHER: It says that they elect one judge and two lawyers.

JUSTICE YOUNG: Okay, I understand that. It's the one that's allocated to a judge.

MR. FISCHER: If the lawyer became a judge, no question the lawyer is out.

JUSTICE YOUNG: Okay.

MR. FISCHER: Do you want to ask me the question that you asked Judge Murphy because I can't say anything anyway.

JUSTICE KELLY: You want me to ask you the question again. It has to do with whether the Commission should have jurisdiction over an action brought after the person's tenure is over.

MR. FISCHER: One of the things that we point out in Rule 205 is that the current rule differs from the old rule in that if a current judge committed attorney misconduct, the current rule doesn't seem to allow the Commission to prosecute it, and I think that's a mistake. I think that needs to be corrected because if an attorney created misconduct and is now a judge, they shouldn't be allowed to hide behind, in essence, the robe. By the same token, a judge who has committed misconduct somehow and then becomes an attorney, the Commission isn't really equipped to deal with that. The Commission just doesn't have the kind of experience in dealing with the various types of attorney misconduct that exists. I know there have been examples of attorney misconduct where I've spoken with people from the attorney grievance and discipline side where they say well that would have resulted in a stiffer sentence on our side than it was at the Judicial Tenure Commission. So I think that they just don't have the range of experience to deal with it. And more, as Judge Murphy was pointing out too, just take the Chernowski example, if she had resigned before a formal complaint had been issued, the Commission would have had no jurisdiction. We wouldn't have been able to do anything. If she had resigned after the formal complaint had been issued, what could the Commission have done. The most they could have done was recommend a public censure. They couldn't recommend a suspension of any kind, a removal of any kind, and this Court couldn't have done anything else.

JUSTICE CORRIGAN: I don't understand your argument then for

expanding your jurisdiction in that fashion.

MR. FISCHER: What the Commission wants is that the status of the individual at the time of the prosecution, so to speak, is what determines who handles it.

JUSTICE CORRIGAN: Why should that be. Wouldn't that run up against a constitutional objection in terms of what you could recommend to our Court, that the Commission could recommend, because there are only several stated sanctions that are in the constitutional provision so why does the Constitution permit you to act against a former judge.

MR. FISCHER: No, we don't want the former judge. The status at the time of the prosecution, not at the time of the offense. So that if an attorney who commits the misconduct is now a judge, the Commission handles, and a judge who commits misconduct but now becomes an attorney for whatever reason, the Attorney Grievance handles. And in a way to try and dovetail it

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JUSTICE CORRIGAN: Can I ask you why then you would expand the definition of judge to include former judges.

MR. FISCHER: The rule that we submitted was to include former judges--

JUSTICE CORRIGAN: A person who formerly held such office and is named in a request for investigation that was filed during the person's tenure and is related to the office.

MR. FISCHER: We thought that was a better version than you had. I'm happy not to have that one too. The probative standard was always that if the former complaint had been issued, the judge is stuck with the Tenure Commission. This was just to expand it a little further so that at least a request for investigation had to have been filed already. Otherwise we don't want to get an after the fact request for investigation on some attorney now who just used to happen to be a judge. That's what we were trying to avoid.

JUSTICE YOUNG: You raised a question about the JTC's competence to really adjudicate attorney discipline issues. How is that any different from the case in which the Commission is examining a current judge whose conduct as a lawyer before he or she became a judge, how you become more competent to adjudicate those kinds of attorney grievance issues than the ones that you are suggesting--

MR. FISCHER: It's a matter of experience. They would get the experience and be able to handle it. But I just know that--

JUSTICE YOUNG: No, I'm really talking about competence of the JTC on attorney misconduct.

MR. FISCHER: We get very few complaints about a current judge as an attorney, very few. And the ones that we do get are usually fee disputes that we're able to resolve carefully. There are much more of the cases where the complaint is against the judge who then resigns, retires or whatever else happens so there are far more on the other side rather than investigating a current judge for attorney misconduct rather than a now attorney who used to be a judge. We don't have to be involved with that. So it's just a numbers matter. We just don't get the cases. And I would say if you could somehow dovetail the attorney process with the judicial process, so again just using Chernowski as an example, not for any other particular reason. The Supreme Court finished with her and then the attorney grievance starts with her. If there was some way they could begin their process at the same time that the Commission issued it's formal complaint, they don't have to make a recommendation or decision but they can do whatever procedure they have to do because the cases would be so similar, then could make the recommendation more or less at the same time, it would be a much tighter period of time, there wouldn't be a longer delay and they could handle the attorney misconduct portion or whatever happened to be involved with the judicial misconduct.

JUSTICE KELLY: The proposed rule doesn't require the Commission to deal with attorney misconduct with respect to a judge who is no longer in office. It only requires the Commission to handle judicial misconduct that occurred during the time the person was in office and that was related to the office.

MR. FISCHER: We didn't read it exactly that way and I think that's what led to the--

JUSTICE KELLY: Well those are the words that are used and I frankly can't see how this could involve any action of a person after he or she left office as a judge.

MR. FISCHER: A person who formerly held such office and is named in a request for investigation with respect to conduct that occurred during the person's tenure and is related to the office. That's the part that we could do without. Again, I don't call it a status offense but the status of the person at the time of the prosecution. If the person is a judge, the Tenure Commission handles it. If the person at the time of the prosecution is an attorney, let the attorney system handle it.

JUSTICE YOUNG: But the nature of the misconduct is judicial misconduct. And there is a practical real world issue here. We do have a number of former judges who get appointed every day to serve in gap filling.

JUSTICE CORRIGAN: But those persons are defined as judges currently, are they not. If it's a former judge who is serving as a visiting judge, they are within your jurisdiction as I understand it.

MR. FISCHER: Yes. Once they have an assignment then they become back in the jurisdiction. And in fact there have been times that judges have been required to agree that they won't sit again as visiting judges and they're told point blank if you, the Commission will proceed because the Commission has jurisdiction to go again.

JUSTICE YOUNG: Well I'm really trying to figure out, is there a gap or not. I'm a judge, I allegedly commit misconduct while I'm a judge and then I leave and because I am no longer a judge the JTC says well nox-nix. But I'm still eligible to be appointed to sit in when there are gaps on the bench. So if there is no action on the complaint then I am eligible to be reappointed no matter how heinous the judicial misconduct is.

MR. FISCHER: If a formal complaint had already been issued I would just imagine that the Commission would proceed, at least to go for a public censure. And a public censure would result in that former judge never being appointed. That comes from the State Court Administrator.

JUSTICE YOUNG: Yeah, but I'm talking about if it hasn't gone to formal complaint but there is a significant allegation.

MR. FISCHER: And if it hasn't then the State Court Administrator is allowed to ask the Commission for any information it has or to open up its investigative file, at least tell the State Court Administrator of the information in its file, as to any retired judge or former judge who is eligible for appointment. That also happens. The problem is the State Court Administrator may not know to ask on that particular judge, and rather than ask on every retired judge before appointing him or her, it may be

advantageous to change that provision, it's in the old 9.222, to allow the Tenure Commission to advise the State Court Administrator that a matter was pending against a particular judge, an investigation, and it was dismissed and this is what the allegations were. So we would in essence volunteer that information rather than just respond to it, and that would help the State Court Administrator.

JUSTICE KELLY: But wouldn't it be preferable to allow the Tenure Commission to act on a complaint filed after the person's tenure is completed so that if, for example, you found a sanction appropriate, that would be on the person's record and if that person came back from a distant state and sought appointment or election again as a judge, that would be outstanding and not something that would have to rely on in a private report.

MR. FISCHER: But even the old rule or under any of these new rules, the most the Commission could do would be a public censure. They couldn't do any kind of suspension.

JUSTICE KELLY: It might serve some person, you see what I'm saying.

MR. FISCHER: I understand that.

JUSTICE KELLY: And it would be better than nothing, which might be what we would find right now would happen.

JUSTICE YOUNG: Either way, in the hypothetical where I'm alleged to have done something heinous while in judicial office, that either remains as a cloud because you're going to communicate that to SCAO if I'm considered for an appointment and it is an unresolved cloud or there was in fact misconduct and it hasn't been adjudicated, in which case I am potentially eligible to hold judicial office of some kind thereafter.

MR. FISCHER: But again, if it was something that bad, Judge X did something that bad and then Judge X gets an appointment, the Commission does proceed and can proceed against that judge so it comes back to life. If there's a 10-year gap between the time it happened and the time the judge gets appointed it presents a proof problem--

JUSTICE YOUNG: I understand your point.

JUSTICE CORRIGAN: Thank you Mr. Fischer. We have other witnesses to hear from this morning. I'll call on Judge Knoblock from the Michigan Judges

Association.

JUDGE KNOBLOCK: Good morning, Justices. I'll be very brief. The Michigan Judges Association has submitted to the Court written comments regarding various rules that we have concern with. Primarily the ones that I want to focus on are 9.207(C)(1) and (2) of the proposed rules regarding prompt notice to the judge that a grievance has been filed and secondly the opportunity for the judge to within 28 days respond to that notice. As was pointed out previously by earlier speakers, 90% or more of cases that arise from grievances that have been filed are dismissed without even obtaining the comments of the judge and the members of the Circuit Court bench at least don't feel that it would be productive for them to respond within 28 days of notice of every one of these grievances that are filed and for that reason would prefer the language that we have proposed in our comments. As to 9.207(C)(3) regarding the hearing, I think once again the Tenure Commission is concerned with the problem of having to conduct hearings of the entire commission every time a judge requests a hearing and the judges feel basically the same way that if it's afforded to you you'd better take advantage of it, and would rather not even have to deal with that, and for that reason we have recommended language that would make the hearing permissible but discretionary within the Tenure Commission. Finally, (C)(4), the notice to complainant, this is one that personally is dear to my heart. When I was on the Commission I believe the policy was changed that when a judge was admonished the grievant, prior to this change, was not notified of the fact that the judge had been admonished but only that it was determined after investigation that there was insufficient evidence to warrant the filing of a formal complaint and that the complaint had been disposed of. That was changed and I strongly objected to that, however I was in the minority. The Judges Association, however, supports what has been proposed here and I urge the Court to adopt that amendment. Finally, in dealing in the same realm with confidentiality, MRC 9.221(E), that was a change that was made, as a matter of fact I think I was chair of the Commission or certainly I was on the Commission at the time it was made and it provides for mandatory disclosure to the Attorney Grievance Commission under certain circumstances and because the Attorney Grievance Commission is not subject to the confidentiality limitations that the Tenure Commission is subject to, I believe the Commission at that time and certainly the Judges Association at this time feels that that rule should be changed to once again make that permissible where it could be disclosed but that is not mandatorily disclosed as 9.221(E) currently requires.

JUSTICE YOUNG: You say the Attorney Grievance Commission is not subject to non-disclosure rules.

JUDGE KNOBLOCK: It's not subject to the same constitutional confidentiality requirements that the Tenure Commission is. It's created by the Supreme Court. The Tenure Commission is created by constitutional provision which provides that

the proceedings shall be confidential and that the Supreme Court shall make rules to ensure the confidentiality.

JUSTICE YOUNG: So you're discomforted by the fact that the Supreme Court on its own authority has imposed the non-disclosure obligations on the Attorney Grievance Commission rather than a constitutional requirement.

JUDGE KNOBLOCK: The problem is that the rule as proposed, 9.221(E) provides that notwithstanding the prohibition against disclosure in this rule, the Commission shall disclose information concerning allegations regarding a judge to the Attorney Grievance Commission upon request. So basically it gives license to the Attorney Grievance Commission that anytime they ask for it, the Tenure Commission shall disclose it. And I guess that's where we have a problem with that. I think the information in the possession of the Tenure Commission is confidential and constitutionally required to be confidential and in making a mandatory disclosure in a rule, and there is no judicial supervision of whether or not this information in any particular case should be disclosed, it merely says if the Grievance Commission requests it, it must be disclosed. And that's what the Judges Association--

JUSTICE YOUNG: I thought you were asserting that the confidentiality would be blown by the disclosure.

JUDGE KNOBLOCK: I think it would be.

JUSTICE YOUNG: Then how is a permissive disclosure any more constitutionally permissible than a mandatory one.

JUDGE KNOBLOCK: That's a good point. Perhaps they shouldn't be disclosed in any case. As a matter of fact if you refer to 9.221(A)(1) and (2), I think 9.221(E) is in conflict with that because it provides that the Commission shall not disclose any information and the only information that they are permitted to disclose, this is prior to filing of a formal complaint, that there is an investigation pending or that the investigation is complete in that there is insufficient evidence for the Commission to file a complaint. So the Commission by that rule is barred from doing that and then in (E) that is relaxed. Of course it does say notwithstanding that limitation but I think that (A) as I said is a codification of the constitutional requirement and I think that (E) erodes that.

JUSTICE CORRIGAN: Could you just explain to me how that would work in practice. Suppose Judge X is convicted of taking bribes and the judge is proceeded against in the Tenure Commission, stripped of office. The judge should probably also be disbarred for that conduct. Does that mean that the AGC has to do a

totally independent investigation and that you cannot surrender any of the files in your investigation to the AGC under what you're proposing. So the AGC has to start from scratch. Or how does that work?

JUDGE KNOBLOCK: Typically in a case of that nature from my experience what happens is the criminal investigation is completed before the Tenure Commission acts and that information is what is largely relied upon by the Tenure Commission and that same information is probably what would be relied upon by the Attorney Grievance Commission.

JUSTICE CORRIGAN: Okay, so there is no cooperation there. Let's take away the criminal conviction aspect of it. Let's say it starts in the JTC. There is no conviction but you uncover evidence of bribes. Can you go the other way and disclose that information and why.

JUDGE KNOBLOCK: Yes, because what we are proposing is that the Commission may disclose the information but that it's not mandatory.

JUSTICE YOUNG: I'm surprised by your suggestion that confidentiality, at least of a certain kind, is constitutionally required. Are the public hearings in violation of the constitutional confidentiality principle you're suggesting.

JUDGE KNOBLOCK: No. The Constitution provides a confidentiality of proceedings, period. The Supreme Court is left to make the rules regarding where that line is drawn and the Court has chosen to draw the line at the time a complaint is filed. Anything prior to that is confidential; anything subsequent to that is public.

JUSTICE YOUNG: How interesting.

JUSTICE CORRIGAN: Thank you Judge Knoblock. Appreciate you appearing today. Let me call on Honorable David Clabuesch from the Judicial Conference Executive Committee.

JUDGE CLABUESCH: Good morning. Ladies and gentlemen of the Supreme Court, I'm David Clabuesch and I'm a probate judge and currently serve as the chairperson of the judicial conference of the Michigan State bar. The Judicial Conference is the section of the State Bar to which all judges belong. The executive board of that conference is comprised of 27 judges, 9 each from the Michigan District Judges Association, the Michigan Probate Judges Association and the Michigan Judges Association. In order for that conference to make a formal position on any topic, we must have a majority of the members in attendance from each bench concur. If all three

associations concur then our recommendation is passed on to the Michigan Supreme Court. In this rare occasion we are communicating our position on a direct basis to you pursuant to the request of Justice Corrigan and a copy of my remarks are being made available at the State Bar to seek their endorsement after the presentation today rather than before. In our review of the proposed amendment to MCR 9.200 regarding the operation and structure of the Tenure Commission we have reviewed the text of the proposed changes, the memorandum authorized by Paul Fischer and reviewed the positions taken by the three associations from which our executive board members are elected. Our three groups have all adopted resolutions. Unfortunately they are not entirely concurrent. The resolutions focus in the main areas, however, of bifurcation, due process, statute of limitations and confidentiality. Our first discussion with respect to bifurcation was in the area of bifurcation. In this area two of the three associations rejected the concept of a strict bifurcation. Therefore no formal position was taken. However it was specifically noted that an average of only 20 complaints a year result in the issuance of a 28-day letter and therefore a bifurcated full-time staff certainly may not be economically feasible. In the area of due process it was acknowledged that certain parts of the investigative process may need to occur without the accused judge's knowledge. In fact 90% of all complaints are able to be dismissed without any reply from the accused judge. It is believed that making a judge aware of every complaint filed may cause a waste of judicial time and energy preparing unnecessary responses and result in the discipline process actually being used in an attempt to cause recusals. We were unable to concur as to how much disclosure should be made at the time of the first notice. We also did not reach an absolute agreement about the investigation reaching attorneys who practice before that judge but agreed that having those attorneys know about an investigation of which the judge is unaware is clearly unwise. While an unlimited statute of limitations causes a certain degree of discomfort for most judges, a significant majority concur in the idea of allowing people who have committed, undiscovered serious crimes to continue as a judge simply because a crime occurred long ago and went undiscovered until some bright line statute of limitations was crossed would certainly diminish the standard of public trust we try to uphold. It is the opinion of the executive board that the Tenure Commission should always consider the length of time that has elapsed since the infraction and the nature of the misconduct in determining the type or amount of discipline to be recommended for the offending judge. The Tenure Commission should also include in its findings how the passage of time and the nature of the activity was factored in as part of any recommendation. Each of the areas I've just described is supported by a majority of those in attendance at our meetings, but failed to get a majority of the members of each association to support the position or, when all were in favor, the proposals differed slightly from the formal positions taken by their respective associations. I have offered the foregoing so that you understand that there has been significant deliberation in this area and virtually all agree that some change is necessary. However the various associations are generally unable to totally concur on the exact

nature and scope of the change. A final area we discussed concerned confidentiality, particularly if the recommended discipline is at the level of some private admonishment or below. The past practice of the Tenure Commission has been to tell the person filing the complaint of the results even when the results were some sort of private sanction. This disclosed has the effect of allowing the complainant to then go public with the results, denying the judge the private sanction that was given. We unanimously agree that when a case is to be handled with a recommendation that the discipline be private, that the only response from the Tenure Commission should be that the case has been resolved in the manner that the Commission deems appropriate or alternative language something to the effect that it was resolved without the filing of a complaint. While it is our desire to offer constructive input with respect to the proposal before you, we did discover during the course of the discussion of the Tenure Commission's plan

JUSTICE CORRIGAN: Judge Clabuesch, how much more do you have to go sir, because your time is up.

JUDGE CLABUESCH: One paragraph. The Commission's plan of developing a series of internal operating procedures which it intends to make available to all judges. These internal operating procedures, called IOPs, are intended to address the issues of statute of limitations as a component of recommended discipline and a protocol for providing notice of pending investigations. As a result, rather than move forward with the proposed changes that are before you today, we have unanimously adopted a resolution requesting that you either reject or table the proposed changes that are before you today and in lieu thereof require the Tenure Commission to develop and circulate a proposed set of internal operating procedures, seek comment on those IOPs from the State Bar of Michigan and the staff of the Michigan Supreme Court. Then after consultation between the Tenure Commission, its staff and the court staff, offer a single, all-encompassing proposed amendment. The Judicial Conference would be honored to appoint a committee from its membership to assist in this process if you felt it was necessary. Thank you.

JUSTICE CORRIGAN: Thank you. Any questions for Judge Clabuesch.

JUSTICE YOUNG: Just one. I've always had vapor lock about private discipline. Sub-public discipline. I've always had difficulty understanding the nature of discipline meted out that was private in nature and do you regard a private censure discipline.

JUDGE CLABUESCH: Yes.

JUSTICE YOUNG: Then how can it be private. If a judge has done

something warranting discipline, how in the nature of the duties of judge can that remain private, just conceptually.

JUDGE CLABUESCH: I guess that's what we're talking about in the internal operating procedures as to what is intended if you get a private discipline if that's what it's called.

JUSTICE YOUNG: I'm merely challenging the concept. Do you have a position on that.

JUDGE CLABUESCH: I do not, no.

JUSTICE YOUNG: Do you favor the continuation of discipline given that is unknown to the public.

JUDGE CLABUESCH: In certain areas, yes I do.

JUSTICE YOUNG: And the rationale is?

JUDGE CLABUESCH: I think that there may be things that can be dealt with privately with a judge to, for example, an admonishment saying this is something you shouldn't have done that need not be a full public proceeding. For one thing the willingness of a judge to accept those kinds of disciplines when they know that they are going to go public may certainly be a bar and result in more formal proceedings having to go forward. Whereas most of those are done on, I understand, some type of concurrent basis where the judge concurs in the nature of the discipline.

JUSTICE YOUNG: Given the public nature of the office that seems like an awfully self-referential explanation, doesn't it.

JUDGE CLABUESCH: It may be.

JUSTICE MARKMAN: Would you characterize an admonition as being unknown to the public where in fact it is known to the complainant.

JUDGE CLABUESCH: My position is that in the event something happens and the judge is told that this is to be a private issue between the Tenure Commission and the judge, that's what it should be. In the event that it is not, then that's fine but it needs to be set out as an internal operating procedure and if in fact every admonition or letter that comes to the Tenure Commission is in fact going to be because there was merit to a complaint. A judge dozed off in court one day and somebody sent the

letter and the Tenure Commission says we verified that that happened, clearly if they want to say that is grounds to make that entirely a public process, the internal operating procedures need to be in place so the judge when they say I'm concurring with that as a private disciplinary conduct knows that in fact it can go public. And that's the only position. I don't really care whether it is or is not public. I think they have a right to notice in the regulations or protocol as to how much publicity is going to have in it.

JUSTICE MARKMAN: Do you think the people you are representing do or do not care whether it is made public. They have no view on that.

JUDGE CLABUESCH: I'm certain they do. I don't have the right to speak on their behalf. Privately I would say that I have a right to know what the operating procedures are so when I stipulate, if I were to stipulate to a misconduct of some kind on a private basis, that I know that in fact it is private, or in fact that it is public. And I think that's the province of the Tenure Commission and this body, quite frankly.

JUSTICE KELLY: Judge Clabuesch, I'm concerned about your recommendation that this Court hold up acting on proposed rule changes until internal operating procedures are written up and included because apparently it's been 3 years that we have been considering these changes and I'm concerned that your suggestion would further prolong any passage of rule changes well into the future. What's your comment on that.

JUDGE CLABUESCH: That's why my comments were in the alternative. I've tried to give you the nature of our deliberation to be constructive in case you decide to move forward. However, in the course of this the fact that all of a sudden these internal operating procedures which may, in fact, be a result of the last 3 years, but now looking to be formalized, I believe that it is a better proposal--that is to say, we've limped along, that's fine--

JUSTICE CORRIGAN: I don't even understand how what is being described as an "internal operating procedure" fits that definition. When you talk about private sanctions, that's the way the Tenure Commission interfaces with the public. That isn't an internal operating procedure vis-à-vis how the Commission handles its internal files. That should be the subject of rule making because it governs public and what happens to a judge, what a sanction is, as it affects a third party. As I understand IOPs, it is so that one can understand the internal handling of files and how the court or the entity, whatever it is, governs itself vis-à-vis those files. So I don't see how even what you're saying constitutes IOPs versus rulemaking and why we should hold up the process for that.

JUDGE CLABUESCH: For example, I would assume at some point an IOP would deal with Justice Young's question that at what point does the executive director and prosecutor function become divorced and so that people have an ability to review some type of--

JUSTICE CORRIGAN: How do you define an IOP. What do you think an IOP is.

JUDGE CLABUESCH: I believe it is similar to the regs that you would see dealing with a government agency that describe its conduct, that given people some degree of certainty as to what the nature of the protocol to be used to fit certain definitions are. So that the question of the executive director versus bifurcation is one. The other one had to do with the notice question versus noticing everybody at the first as opposed to some of the other conduct that has from time to time happened where in fact investigations have gone forward where staff and attorneys have actually known about investigations where a judge didn't know. I think there needs to be a protocol established that you can look at and say here is the operating procedure that the Tenure Commission will use when moving forward on a claim or a complaint of a private citizen.

JUSTICE MARKMAN: But aren't you defining the entirety of the scope of the rules as somehow being encompassed by internal operating procedures. Maybe it is just a technical matter but we've used those to discuss things that are truly part of the administrative operation of the JTC and don't affect the larger rights of parties who may be involved in cases before the JTC.

JUDGE CLABUESCH: Clearly they have to be consistent with any court rule that you establish and to the extent that they become substantive, they absolutely have to be incorporated in the court rules which is part of the reason for the motion to table because I think we want to make sure that we don't come up with a series of regulations which are inconsistent with what we're trying to do. At the same time not establish bright line statute of limitations, those kinds of things for example.

JUSTICE CORRIGAN: All right. I think we understand your position and we thank you for coming today. Judge Ramona Roberts from the Michigan District Judges.

JUDGE ROBERTS: May it please the Court, good morning Justices of the Michigan Supreme Court. My name is Ramona Roberts and I am a district court judge presently serving as president of the Michigan District Judges Association. The Michigan District Judges Association has 265 members strong. I stand before you this morning for 3 minutes to address the proposed revisions to the Michigan Court Rule 9.200 which

governs the judicial discipline system. Our proposal would reflect our thoughtful review of the existing rules and strike an excellent balance between preserving the integrity of the judicial system, ensuring public confidence in the judiciary and protecting the rights of judges who are governed by these rules. Our emphasis would be in the areas of due process and the statute of limitations. It has been the Michigan District Judges Association's consistent position to recommend that bifurcation exist in the disciplinary process. This bifurcation process would be similar to the procedure followed by the Attorney Grievance Commission and as stated by Judge Clabuesch, the Attorney Discipline Board. We would emphasize that the prosecutorial investigative process and the adjudicative process should be separate and distinguishable. In addressing the issue of due process the Michigan District Judges Association stands with the other associations. My association would place emphasis on the area involving investigation of a judge. In the event that the investigation involved the judge's staff beyond the transcript request and interviews are to be conducted with the staff, then the judge should be made aware that an investigation is in progress. The Michigan District Judges Association if offering proposals for change would propose that a statute of limitations be adopted. There are a number of states which limit the filing of any claim to six years after the alleged misconduct. However, if the misconduct was egregious and occurred long ago and if finally discovered, a judge who has committed a serious crime, whenever discovered, should not continue to serve as a judge. Such allowance would impact on the public's trust in our judicial system. The Michigan District Judges Association stands prepared, ready, willing and able to assist this Honorable Court in any manner that might be requested. Thank you for allowing us to address you this morning.

JUSTICE CORRIGAN: Thank you Judge Roberts. Are there any questions? Thank you for being here. Lola Telmos. All right. We'll move to Item 2.

Item 2: 2001-29, MRE 702

JUSTICE CORRIGAN: Judge Ryan.

JUDGE RYAN: May it please the Court, Dan Ryan, voice in the evidentiary wilderness. The matter that I'm here to address is the proposed amendment to Michigan Rule of Evidence 702 but first of all, Justice Corrigan, I was wondering if I could get a tardy slip for my prosecutor. In all seriousness, in light of the recent articles about the Third Circuit. But nonetheless, there are two points I would like to make first of all. The first point I would like to make is what I believe the necessity of creating a standing committee for the Rules of Evidence, particularly the Michigan Rules of Evidence. The second point is the necessity of the amendment to Michigan Rule of Evidence 702. First of all, the most recent committee that was headed by the Court was the committee headed by Judge Giovan. That was designated for a specific term, that term

is expired and a new committee, I believe, needs to be appointed to address evidentiary issues as they occur, whether it's involving juvenile matters or other matters. I think a committee needs to be appointed. Other standing committees exist addressing continuing concerns such as the civil and criminal jury instructions, the most recent committee regarding criminal procedure and others. I believe that we need an evidence committee as well. Why? We need to continually monitor legislative developments like MCL 600.2955 and the statute particularly addressed in McDougall v Schantz and we also need to have a continuing dialogue perhaps with the legislative process. I know it's not necessarily our function to engage in policy type of determinations but perhaps it is important for us to keep abreast of what the Legislature is concerned about so that we don't have to amend the rules after the fact like we are in this particular instance. The second point is necessity of amendment to 702. It is my position that because of the legislative intervention in this particular area that in essence the Court is mandated to revise Michigan Rule of Evidence 702. The issue is how do we do this. And I know I presented a lengthy article. If you haven't read it, it's virtually guaranteed to cure any insomnia that you may have but there are a couple of reasons why I think we need to amend the rule, it's just an issue of how we are to amend that particular rule. Judge Giovan, although I was not necessarily on his committee, I also participated through his committee by submitting some paperwork relative to other rules, but I spoke to Judge Giovan yesterday and he indicated that his particular committee was not asked to address this particular amendment. That they were specifically asked to address the proposed amendment which corresponds with the federal rule of evidence that is now in existence, and for various reasons he did not recommend that the Court adopt that. My time is up. I'm a stickler for detail. But nonetheless I think sometimes that, for example, the Legislature may act prematurely. The statute which is being presented was a very narrow statute. It just addressed scientific opinion testimony in tort cases. We have a multiplicity of standards which now govern the admissibility of expert opinion testimony in Michigan. I think it's an appropriate time to amend Rule 702 and I've suggested three alternatives which I have attached, not necessarily because they are gospel, so to speak, but to provoke additional comment and thought about how we are to amend Rule 702. At this time, any questions?

JUSTICE TAYLOR: Judge Ryan, what would you think about this Court adopting FRE 702.

JUDGE RYAN: Personally I have a problem, and when I teach evidence in various different locations across the country, if the Court was able to interpret the original 702 before it's Daubert-like modifications which were incorporated in December of 2000, then why was it necessary to add this. And if the Court said in Daubert that this is a flexible test to be applied broadly, then why did the evidentiary committee go and delineate standard 1, 2 and 3. That's just me and my personal philosophy. I think if we deleted the word "recognized" from the current, existing 702--

JUSTICE TAYLOR: Can I just ask you, I guess to cut to the chase, what do you think about FRE 702. Is what you're saying no.

JUDGE RYAN: I don't necessarily like the current version of 702 on the federal level. If we were to delete the word "recognized" then we could revert to--and there is case law in Michigan existing which would allow the Court to interpret 702 to be a relevance and reliability standard.

JUSTICE YOUNG: So if we deleted the word "recognized" from 702

JUDGE RYAN: Right, the court could. The problem that has now been raised is the Legislature thought that the Court in essence was behind the power curve and the Court was interpreting Frye-Davis, Frye-Davis, Frye-Davis and said no that's not necessarily sufficient. We want this Daubert test. Now from a policy perspective, whether that's prudent or not, I'm not sure. If Frye in its general acceptance was a pretty good way of keeping out junk science. The Daubert test as originally proposed was to liberalize the standards, to let this novel scientific opinion testimony in but at the same time in it's application Daubert has kept junk science out. But it's original intent was to be a more liberal, looser standard than Frye-Davis. But the Legislature has already made that policy decision for us, as far as judges are concerned.

JUSTICE YOUNG: Arguably, in a certain group of cases.

JUDGE RYAN: Very limited.

JUSTICE YOUNG: I thought that the real motive force of Daubert and its progeny was to reinvigorate the role of the judge as the gatekeeper of this. Instead of saying let the lying begin, the judge was supposed to make a threshold determination which our version of Rule 702 says but has been largely ignored by the trial bench.

JUDGE RYAN: I'll try to do my best not to. But you're correct. Daubert had multiple functions. It created the gatekeeper and it shifted the default position of the trial judges to put the onus more on the trial judge to keep that type of information from going to the jury under 104(A). But on the other hand it also created a new standard of relevance and reliability. The policy determination has been made but right now, as I set forth in my article, we've got about 5 standards currently existing in Michigan which govern the admissibility of expert opinion testimony and I think it's necessary at this point to sit down and think about this to assist the trial judges in what standard do I apply. And I think we need a little bit of clarification on this issue. I submitted three proposals. The first proposal deletes the word "recognized" and then parallels the federal rule as it now

exists, as modified. In the article I just dropped a comment, if the court was able to determine the original 702 in that way, then why was it necessary to go ahead and delineate 1, 2 and 3 as the prongs that you are now to apply as a trial judge. That's just my rhetorical comment. The second version is somewhat in between where I suggested that we address the expert qualification standard which is addressed in McDougall v Schantz and somewhat synthesize it, not necessarily delineate the statute. And the third prong gives Michigan probably the longest rule of evidence of any state in the union but it sets forth the precise statutory language and incorporates that in the rule so that the practitioner, whether that be the trial judge or the attorney before the trial judge, has the rules right there in front of them.

JUSTICE CORRIGAN: Any questions to Judge Ryan.

JUSTICE KELLY: Did you submit those in order of preference, Judge Ryan.

JUDGE RYAN: No, I did not. I think as a matter of convenience, although it's an extremely long rule, the third alternative which incorporates the language of the statute is probably the best for the practitioner. As far as the other versions, if they want to be synthesized and we can work on the language and hammer it out, I did not necessarily mete this out quickly, I was in response to their deadlines but I'm sure there is some language that needs to be fine-tuned there that we could synthesize these concerns about expert testifying in medical malpractice cases and then scientific opinion testimony. But still at the same time we may have multiple standards there and we need to be a little bit concerned about that.

JUSTICE KELLY: I appreciated your article, Judge, and I think you for it, it was very helpful.

JUDGE RYAN: Thank you, Justice Kelly.

JUSTICE CORRIGAN: Any other questions? All right, thank you Judge Ryan. We invite you to submit anything supplemental that would help clarify your position if you choose. Richard Bisio.

MR. BISIO: Good morning, may it please the Court, Richard Bisio. I appear on behalf of the State Bar Civil Procedure Committee and we submitted a comment to the Court on this rule. You have a statute that is arguably something that the Court must give precedence to under McDougall v Schantz. But it's a statute that is in part internally inconsistent because it purports to adopt both Daubert and the Davis-Frye standards and it has a limited scope. It applies the Daubert standard only to personal

injury cases and only to scientific evidence. If you adhere to the McDougall definition of what constitutes practice and procedure, then you probably need to defer to this statute because we can conceive of some basis for the statute other than simple judicial dispatch of business. But should that be done by way of a rule amendment this specifically incorporates the statute. Our recommendation is not to do that because that creates inconsistencies among different types of cases and different types of expert evidence and it doesn't resolve the internal inconsistency in the statute. That's why we advocate adoption of the Federal Rule 702 that would apply the same standard to all cases and all types of expert evidence. Now that would admittedly leave an inconsistency with the statute because the rule would be consistent with the statute insofar as it would adopt the Daubert standards but it would be inconsistent with the statute insofar as the statute also requires the application of the Davis-Frye standards. That's an inconsistency that is in the statute itself and there is nothing to be done by way of rule making by this Court if you think that the Court has to defer to the statute. I would suggest, however, that you could resolve that inconsistency by revisiting the narrow definition of this Court's authority over practice and procedure in McDougall v Schantz. I suggest to you that McDougall is perhaps unnecessarily limiting on this Court's authority over practice and procedure in areas where arguably you should take precedence over what the Legislature does. Because you have a very simple test in McDougall but under that test virtually any matter of procedure can be characterized as substantive by ascribing some kind of policy justification to it that's not rooted solely in judicial dispatch of litigation. Now the federal courts have struggled with this same kind of question in terms of making the distinction between procedure and substance in trying to decide cases under the Federal Rules Enabling Act. They came out with a test that is pretty much at the opposite end of the spectrum of the test that you have adopted in McDougall v Schantz. In the federal courts the test is if it's arguably procedural, then the Federal Rules of Civil Procedure apply over conflicting state procedure or state enactments. I'm not suggesting that's necessarily the appropriate test that you should adopt and you don't need to decide that as a general matter in this kind of an administrative proceeding. But what you can do here is decide that in this particular instance what we have here is a matter of practice and procedure that this Court should control and you should establish a clear and consistent rule of evidence for all expert testimony. The matter that we have before us today is arguably a matter of practice and procedure where you should set that uniform rule.

JUSTICE CORRIGAN: All right, we thank you Mr. Bisio. Any questions? Thank you for being here. Has Lola Telmos arrived? Next item.

Item 3: 2001-06, MCR 2.102.

JUSTICE CORRIGAN: Is Terri Stangl from the State Bar Standing Committee on Legal Aid here please.

MS. STANGL: Good morning, may it please the Court, my name is Terri Stangl. I'm the chairperson for the Standing Committee on Legal Aid for the State Bar. The State Bar itself has not taken a position on this rule but has authorized committees and sections to take positions on it, which is why I'm here. The standing committee is in strong support of the intention of this rule, which was to provide access to the courts to prisoners in matters involving their children. There are certainly serious constitutional issues involved there and from both the perspective of the family and the courts who are trying to resolve those issues, it can be useful to have actual participation by prisoners. The proposed rule arose as a result of litigation between prisoners, primarily women prisoners and the Department of Corrections and as a part of that the Department of Corrections agreed to have a proposed rule that would implement the settlement in the case in which the Department of Corrections would provide telephone access without charge to the prisoners to the court or the Friend of the Court. The comments of the Legal Aid Committee are primarily logistical and this morning I have submitted to the Court a summary of my comments together with proposed revisions to 2000-6 that would incorporate the recommendations that we're making this morning. The first recommendations concern how the order itself is entered. The original proposed order envisioned in the Kane case had the court enter the order and then it would serve it on the parties. The rule as currently proposed to this Court has a moving party, the person who wants the order regarding the child, whether that's the Family Independence Agency or a private party would have to first draft a motion, serve it on the prisoner for the underlying relief, then draft a motion, serve it on the court to get an order for telephone participation, and then serve it on the prisoner. So it was a two-part fairly burdensome process. Although this might be feasible for the prosecutor or Family Independence Agency, it is quite burdensome on the increasing number of pro se litigants who are trying to handle simple custody or child matters, guardianships, on their own. The suggested alternative that we have attached to our comments envisions a process where the moving party would put the court on notice that the respondent is incarcerated, a statement in the heading. And they would have to provide the court with the prison number and location. And then the court could sua sponte enter an ex parte order as an administrative matter to say that prisoners should participate by phone. That would then get served by the court on the parties and the Department of Corrections and it could be a simple matter of access. And similar in some ways for an order for transport. This is how we make the prisoner available to the judicial process. The second area of proposed change concerns the content of the order. Both the original Kane order and the proposed rule today have a very simple description of the kind of order. Our proposed revision would make it clear that the order should have the prisoner's number and location, make it clear on the kind of service and make it clear on the kinds of proceedings. The proposed court rule is a little vague on what kind of proceedings would be covered. We feel that the judge should be able to specify whether the order for telephone participation is for a single matter or a

standing order that any of certain specified proceedings could be addressed by telephone, and that would be set forth in the administrative order. And finally the last area of change would be the consequences of not following the rule which would have in this case our proposal is that the court look at whether the rule is followed, not whether a private moving party has followed the rule. Thank you.

JUSTICE CORRIGAN: All right. Any questions.

JUSTICE KELLY: The rule as originally considered by the Court put the burden on the court to contact the prisoner and locate that person. And because of separation of powers concerns we reworded what you have before you. Can you address yourself to why your proposal to again put the burden of contacting the Department on the court does not present a separation of powers problem.

MS. STANGL: I think it partly turns on what we mean by contacting in this case. The proposal that we have made to you the moving party would provide the court with the logistical information on how to enter an order. The prisoner number, the prisoner location. That would still be outside the court process. All the court would do is enter a logistical order saying in this matter the prisoner should participate by telephone. It is a way of providing access.

JUSTICE CORRIGAN: These are new rules you're submitting here this morning, right. They are nothing in front of us so we haven't really seen them yet. This is a revision, right.

MS. STANGL: It is, correct. I apologize that you haven't seen it today. So that the proposal we're making for your consideration recognizes that it is not for the court to be tracking down the prisoner, that that should be in the initial pleadings. And once the court has that information then it is in the position to enter what I am referring to as administrative orders setting up the process which would be sent by mail to the prisoner and the prison who would then have to make the prisoner available for the specified proceedings.

JUSTICE CORRIGAN: Ms. Stangl, with this most recent revision that you have submitted to us, have you negotiated these things with the Department of Corrections or is this an ex parte suggestion on the part of the State Bar Standing Committee. Or is this a procedure with which the Department of Corrections concurs.

MS. STANGL: I have not spoken directly with the Department of Corrections. I have spoken with counsel for the plaintiffs on this matter, whose position is attached to our comments. I have reviewed the original comments of the Department of

Corrections to the prior version of the order and I tried to keep those in mind in drafting but no, we have not had a direct conversation. I understand there is someone here today and I will provide a copy to them.

JUSTICE CORRIGAN: It would be helpful to the Court if that could be worked out with them rather than--

JUSTICE YOUNG: Can I just ask a question. This seems like a fairly simple process. Why isn't this something that can easily be done by pro se moving party on forms. A motion for an ex parte order, the movant provides all the information, submits it to the court for the court to enter the order. Why is that too great a burden to put on even a pro se movant.

MS. STANGL: I believe there may be a process that would be possible. The current order before the Court does not specify as ex parte and it sets up a two-part service. First you serve the prisoner with the underlying substantive motion, then you get a motion for telephone participation and then you have to serve that separately. If it were a unified process where you could get the order up front and then serve that together with the underlying substantive motion, that may be more doable. But as drafted--

JUSTICE CORRIGAN: Has your committee done anything to develop such forms that would assist pro se's or is that burden to be put on our court. Because that would be helpful to the court as well, if you had a form that pro se's could use, that would help us very much rather than the theoretical or abstract suggestion that that be done.

MS. STANGL: Well I think that first we're trying to set up what we believe is the simplest process and once that process has been established by the court, then certainly we would be happy to work with going through the State Court Administrator and our own offices to make it more accessible.

JUSTICE YOUNG: I think what you're requiring the court to do is what is ordinarily a party's work and I'll speak for myself, reducing that instinct in the rule will make your proposal more successful so simplifying the process consistent with due process rights of all parties but not shifting the burden of a moving party onto the court will make your proposal more successful with me, at least.

MS. STANGL: I appreciate that. We were partly also looking at other areas within the existing court rules where courts are empowered on their own to order telephone participation for pretrial conferences or motion hearings, courts may do that. And this is a kind of relationship. This is another way of assuring a party who cannot be present may participate by phone. So we saw it as more of an administrative rather than

purely substantive.

JUSTICE CORRIGAN: All right, thank you Ms. Stangl for being here today. Jeffrey Bauman from the Department of Corrections.

MR. BAUMAN: (new tape--first part not taped) regarding this rule. Then Director Martin in January of 2001 sent a letter to the Court to Clerk Davis indicating at that time some difficulties that we had with the proposed language. We've reviewed the language that was published in November of 2001. That language takes care of all the concerns the Department had and as a result of the settlement in Kane we don't oppose that language. If I may for just a moment, there were two things that Ms. Stangl mentioned that I thought maybe I should address with you. We have not seen the proposal, nor have we talked with anyone about their proposal. She did, however, mention that the original service of the motion created difficulty on pro se litigants. I would suggest to the Court that it also serves, however, to confirm the location of the inmate. Inmates move in our system daily. Not quite so much in the female facilities because there are only three. But we have 45,000 inmates in our facility and last year we did approximately 970 calls that would fit under this rule with courts involving minor children and inmates. Not just female inmates but also with male inmates. So that original service of the motion confirms that that's where the individual is that the court would like to set up the phone call with. It also allows us to have some notice of a general time frame of when we're talking about doing this with the inmate. The greatest problem that the Department has is either when we don't receive the notice from the court of the time or because of the court's docket the court is unable to stick with the time in the order for the call. Obviously inmates do a lot of things during the day. They go to work, they go to school, they shower, they go to counseling. In one instance we got an order from the court to set up a phone conference and the particular inmate was on a writ to that court for that particular time. You can imagine if we move someone to a room to have a conference call and they sit for two or three hours and wait, that creates some difficult problems for the prison, particularly since the most dangerous time in a prison is during prisoner movement. Because of that danger, however, we support the concept of this rule that a phone conference is much better than transporting someone to the court. The other issue she raised was that of a standing order. I think for the reasons I just stated you can understand how that may create difficulties. We really need an order that says a time and a date for the phone conference to take place.

JUSTICE KELLY: I have a question about the location of prisoners. I've heard comments before by representatives of the Department about the difficulty of knowing where a prisoner is and that has always confused me. It seems to me if there is anybody in the state that ought to know where a prisoner is, heaven help us, it ought to be the Department of Corrections.

MR. BAUMAN: I can assure you that we know where all of our prisoners are, but we have 45,000 prisoners and 19,000 employees, and I can also assure you that not all of those 19,000 employees know where each of those 45,000 prisoners are.

JUSTICE KELLY: But by computer can you not locate by using a prisoner number, the facility a prisoner is in instantly.

MR. BAUMAN: As can you or as can a pro se litigant on the internet. We have the offender tracking information system that will tell you with 24-hour accuracy where that prisoner is. But if somebody does an order to move a prisoner for whatever reason, it takes some time for that information to get into a database.

JUSTICE KELLY: If for example you received an order from a court indicating a prisoner was to be made available for a telephone call and because of the mobility you mentioned earlier, that prisoner since has been moved to a different facility, that wouldn't present a problem for you would it to simply route that order to the right facility.

MR. BAUMAN: If we had received the order at the facility where the inmate was housed, it would be simpler for the Department to keep the inmate there to make that inmate available for the phone call.

JUSTICE KELLY: If you receive the order at a facility at which the inmate used to be but no longer is, you would forward that order to the facility where the inmate is at that time, is that right.

MR. BAUMAN: Yes. Now that could create difficulties when an order comes in, depending on who it goes to. If it's sent to the right party, the litigation coordinator at the facility who handles litigation matters, that would be relatively simple to get that order transferred. But you can also imagine, I think, that to go from one desk to another desk to another desk, the lead time that we have that order is very important.

JUSTICE KELLY: Can anyone obtain a prisoner number using the internet.

MR. BAUMAN: Yes. It's a little more difficult if you want to find a prisoner number for an inmate named, for instance, Joe Smith, because there may be a lot of Joe Smiths. But if you have a last name, a race, a date of birth, a first name, each of the different variables you can add, the easier it is to find that information. And again, once you have the number you can also find that location on the internet.

JUSTICE CORRIGAN: All right, thank you Mr. Baughman. The balance of the items, 4, 5 and 6, we have no witnesses listed for. Is there anyone who has not been called on this morning who is present? All right, thank you all very much. We stand adjourned.